

COMPLIANCE BOARD OPINION NO. 02-3
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May 10, 2002

Mr. Wayne Witzke

The Open Meetings Compliance Board has considered your complaint that the Wicomico County Council violated the Open Meetings Act on March 19, 2002, when it conducted a meeting that was closed to the public. For the reasons explained below, the Compliance Board concludes that the Council violated the Act by conducting an improperly closed discussion of the following two topics: the placement of mobile homes as secondary dwellings on lots in hardship cases, and the potential expansion of the local management board. The other matters considered during the closed session appear to fall within the Act's exclusion for executive functions; therefore, discussion of them in closed session did not violate the Act.

I

Complaint and Response

The essence of your complaint is that on March 19, 2002, the Wicomico County Council violated the substantive and procedural requirements of the Open Meetings Act. Specifically, you indicated that the Council closed its meeting to the public without preparing a written statement of the reasons for closing the meeting and without conducting a vote in favor of closure. *See* §10-508(d)(2).¹ You noted that proper notice of the closed session was not provided in accordance with §10-506. You also indicated that the topics considered during the closed session did not fall within any of the permissible exceptions enumerated in §10-508(a). Finally, you indicated that the session involved a conditional use and zoning matter covered under §10-503(b).

In a timely response on behalf of the Council, the County's attorney, Edgar A. Baker, Jr., Esquire, noted that in Wicomico County, the Council is vested with both legislative and executive responsibilities. Mr. Baker indicated that "[o]n March 19, 2002 [the] Council was acting in the executive function by hearing reports of various department directors and considering the implementation of existing County

¹ Unless otherwise indicated, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

policy.” Citing §10-503(a)(1), Mr. Baker noted that “[t]he Open Meetings Act clearly excludes a public body from the requirements of the Act when it is acting in an ‘executive function’ ... [A]s occurred on March 19, [the] Council may simply close the session when warranted.”²

Mr. Baker then outlined the matters discussed at the closed session on March 19: application of existing county policy regarding temporary placement of mobile homes on lots as second dwellings in hardship cases; negotiation strategy for future sessions concerning a contract for fire services; matters involving the County’s local management board, including the need to appoint an interim director, the appointment of new members, and the possibility of a request to expand the board’s membership; and efforts to locate office space for a local nonprofit association. Mr. Baker concluded: “[E]ach of these items falls within the purview of the Council in its executive function and are therefore not subject to the provisions of the Open Meetings Act.”

II

Analysis

As we wrote last year, “[t]he most bedeviling aspect of Open Meetings Act compliance, especially in a local government ... that combines legislative and administrative responsibilities in a single body, is the interpretation of the Act’s ‘executive function’ exclusion.” Compliance Board Opinion 01-7 (May 8, 2001), slip op. at 3. We have previously recognized that the Wicomico County Council serves as the executive head of the County government, and Council meetings with County department heads concerning the implementation of ongoing projects would typically involve an executive function excluded from the Act. Compliance Board Opinion 01-1, slip op. at 4. Nevertheless, care must be taken to avoid extending this exclusion too far. Although we have been provided with very limited information about the nature of discussions held March 19, we are able to conclude that two of the items considered during the meeting were not excluded from the Act.

² In a prior opinion, we commended the Council when informed that the Council voted on August 15, 2000, to open to the public its work sessions during which it received briefings from county department heads on the status of ongoing projects, notwithstanding the fact that the sessions involved an executive function under the Open Meetings Act. *See* Compliance Board Opinion 01-1 (January 2, 2001), slip op. at 4. We have not been informed how the Council’s decision to close the March 19 session squares with its earlier position.

A. *Location of Mobile Homes*

At the closed meeting held March 19, the Council addressed current county policy pertaining to “the temporary placement of mobile homes on lots as second dwellings in hardship cases.” This discussion may well have involved an executive function. Nevertheless, as we explain, discussion of this matter in a closed meeting violated the Act.

The placement of a temporary mobile residence on property is regulated under Wicomico County’s zoning ordinance.³ Placement of a temporary mobile residence is permissible under the zoning ordinance only as a special exception under multiple residential zoning classifications. *See*, Charter and Code of Wicomico County, §§225-15B(10) (R-8 Dist.), 225-20B(10) (R-15 Dist.), 225-24B(2)(f) (R-20 Dist.), 225-25B(2)(c) (R-21 Dist.), and 225-26B(2)(g) (R-22 Dist.).

Under §10-503, executive functions are generally outside the scope of the Open Meetings Act. However, this statutory exclusion is not absolute. As we recently indicated, “[e]ven if a discussion would otherwise fall within the ‘executive function’ or other exclusion from the Act, the discussion nevertheless is covered by the Act if it concerns ‘a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, *or any other zoning matter.*’” Compliance Board Opinion 01-7, slip op. at 10, *citing* §10-503(b)(2) (emphasis supplied).

Because a discussion on the permissible use of mobile homes on certain lots constitutes a zoning matter, a Council meeting on this matter should have been conducted in accordance with the Open Meetings Act.

B. *Expansion of Local Management Board*

The second item considered on March 19 that we find to be outside the executive function exclusion involved the expansion of the County’s local management board.

In accordance with guidelines developed by the Special Secretary of the Office for Children, Youth, and Families, each county is required to “establish or designate a local management board to ensure the implementation a local,

³ The County ordinance defines “residence, temporary mobile” as one that provides “temporary shelter while an existing dwelling that has been damaged or destroyed by flood, fire or other cause is being restored or rebuilt. It is the intent that the term ‘temporary’ be limited to six months unless good cause is shown to extend such time.” Charter and Code of Wicomico County, §225-3.

interagency service delivery system for children, youth, and families.” Article 49D, §11(a), Annotated Code of Maryland. Article 49D, §11(b) provides that a county may satisfy the statutory mandate to provide a local management board by designating a quasi-public nonprofit corporation that is apart from county government, designating a regional nonprofit corporation or public agency representing multiple jurisdictions, or, as Wicomico County elected, designating a public agency considered an instrumentality of the county government. Office of Children, Youth and Families guidelines recommend, in part, that a local management board be comprised of “mandatory membership from education, juvenile justice, health, local government, mental health and social services who have the authority to commit the resources of their organization” and “up to 49% private sector representatives such as parents, advocacy groups, [and] private providers of children and family services.” Subcabinet for Children, Youth and Families, *Local Management Board Policies and Procedures Manual* Section I, pages 5 - 6 (July 30, 2001). Within these guidelines, a county that establishes a local management board as part of county government has extensive flexibility in terms of size and composition of the board.

The Council established Wicomico County’s local management board through adoption of a resolution on September 16, 1997. *See* Resolution 484.⁴ The resolution sets forth the by-laws of the local management board, addressing, among other matters, the purpose and duties of the board and the composition of the board membership.⁵ While certain items discussed on March 19 in connection with the local management board appear to meet the definition of an executive function, we disagree with the Council’s conclusion that the topic of the board’s appropriate size falls within the executive function exclusion.

In our view, when the Council considers the composition of the local management board, it is clearly involved in a “public policy” determination. There is no question that decisions concerning the composition of a board may affect how the board would be expected to operate and decisions that the board is required to make. Thus, any decision by the Council to alter the size of the local management

⁴ Resolution 484 was subsequently amended by Resolution 522 on December 5, 2000. However, the amendments did not affect the composition of the local management board.

⁵ The local management board’s membership is to consist of “a minimum of 20 and no more than 25 members, with approximately one-half public and one-half private, of which at least 20% will consist of parents whose children are recipients of the services coordinated by the [board].” The resolution requires that certain enumerated government agencies be represented on the local management board and describes criteria for the selection of other representatives. The actual appointments are to be made by the Council. *See* Resolution 484, Article IV - Membership.

board would constitute a legislative function under the Act, §10-502(f)(1),⁶ and, by definition, cannot be considered an executive function. §10-502(d)(iii).⁷ Therefore, even a preliminary briefing of the Council about an anticipated request to expand the board should not have occurred unless the meeting was conducted in accordance with the Act. *See, e.g.*, Compliance Board Opinion 00-10 (October 18, 2000), slip op. at 8 (staff communication desiring that policy matter be placed on future agenda invites discussion concerning the priority that should be assigned the matter and, even if no such discussion in fact occurs, denotes the first step in policy making).

One might argue that establishment of the local management board itself was an executive function in that the Council was simply administering provisions of a State statute requiring establishment or designation of a local management board; thus, any subsequent action would also constitute an executive function. However, such a construction would subvert the policies of the Open Meetings Act, since every action of a local government can be traced back to some source of authority. A general legislative mandate such as Article 49D, §11, just like broad statutory enabling legislation, is not “administered” when a local governing body is engaged in policy formation in carrying out the mandate. *See, e.g.*, Compliance Board Opinion 01-7, slip op. at 9 (addressing general enabling legislation).

III

Conclusion

Although we accept, based on the information available to us, that many of the items considered at the March 19 meeting involved the performance of executive functions excluded from the Act, we conclude that the Wicomico County Council violated the substantive and procedural requirements of the Open Meetings Act when, in the closed meeting, it addressed the use of mobile homes on certain lots as second dwellings and an anticipated request to alter the size of the local management board.

⁶ The Open Meetings Act defines a “legislative function” in part as “the process or act of ...approving, disapproving, enacting, amending, or repealing a law or *other measure to set public policy* ...”. §10-502(f)(1) (emphasis supplied).

⁷ In contrast, when the Council appoints an individual to serve on the local management board pursuant to the resolution, the Council would be engaged in an executive function. *See, e.g.*, Compliance Board Opinion 99-5 (June 22, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 45, 47 (process by which a public body itself makes an appointment, as distinct from the process of considering the confirmation of an appointment made by someone else, constitutes an executive function).

In your complaint, you requested that the Compliance Board “take appropriate action to enjoin the ... Council from the commission of violations in the future.” The opinions of the Compliance Board are strictly advisory, however, and we lack authority to take any enforcement actions. *See* §10-502.5(i).

OPEN MEETINGS COMPLIANCE BOARD

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